

**NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.** See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

**FILED BY CLERK**  
**JUNE 23 2009**  
COURT OF APPEALS  
DIVISION TWO

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

THE STATE OF ARIZONA,	)	
	)	
Respondent,	)	2 CA-CR 2008-0410-PR
	)	DEPARTMENT A
	)	
v.	)	<u>MEMORANDUM DECISION</u>
	)	Not for Publication
CHARLES WAYNE MARIETTA,	)	Rule 111, Rules of
	)	the Supreme Court
Petitioner.	)	
_____	)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20040962

Honorable Hector E. Campoy, Judge

REVIEW GRANTED; RELIEF DENIED

Barbara LaWall, Pima County Attorney  
By Jacob R. Lines

Tucson  
Attorneys for Respondent

Charles Wayne Marietta

Florence  
In Propria Persona

ESPINOSA, Judge.

¶1 Petitioner Charles Wayne Marietta seeks review of the trial court’s denial of a petition for post-conviction relief he filed pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb the granting or denial of post-conviction relief unless the trial court has clearly

abused its discretion, *State v. Bennett*, 213 Ariz. 562, ¶ 17, 146 P.3d 63, 67 (2006), and we find no abuse here.

¶2 After a jury trial in August 2005, Marietta was convicted of sexual conduct and attempted sexual conduct with his minor stepdaughter. The trial court sentenced him to a presumptive, twenty-year prison term for the sexual conduct conviction, to be followed by lifetime probation on the conviction for attempted sexual conduct with a minor. On appeal, this court affirmed his convictions, sentence, and probationary term. *State v. Marietta*, No. 2 CA-CR 2005-0398 (memorandum decision filed Mar. 29, 2007).

¶3 In August 2007, Marietta filed a timely pro se notice of post-conviction relief pursuant to Rule 32. In it, he identified two claims he intended to raise: ineffective assistance of trial counsel and denial of due process occasioned by one or more jurors having allegedly failed to disclose during jury selection that they had been molested as children. Although the record before us does not contain a copy of the order appointing counsel, the trial court apparently did so. In February 2008, counsel filed a notice of review pursuant to Rule 32.4(c)(2), stating that, after thoroughly reviewing the record, he could find no meritorious ground for post-conviction relief.

¶4 Marietta then filed a pro se petition for post-conviction relief in May 2008.<sup>1</sup> Abandoning his proposed ineffective assistance claim, he alleged that, in September and October 2005, several weeks after his trial had concluded, an investigator for the public

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<sup>1</sup>Marietta mistakenly titled the petition a “petition for review” and filed it with this court instead of the trial court.

defender's office had spoken with various members of the jury. According to the investigator's written report, prepared in October 2005 and attached to Marietta's petition below, one of the female jurors reported that "some of the males on the jury said they had been molested as children and they remembered things the way the [victim] remembered." A second juror told the investigator that "one of the male jurors said he had been molested but she thought it was after the trial." Based on the investigator's report containing those statements, Marietta alleged that at least one member of his jury had been "unqualified" and biased in favor of the prosecution based on "having been a past victim of the same offense" as the one with which Marietta was charged. Alleging the unnamed male juror had withheld that information during voir dire, Marietta contended he was unable to exercise his peremptory challenges effectively and was thus denied his right to an impartial jury.

¶5 The trial court initially ruled that Marietta's claim was precluded. It later set aside that ruling and allowed the state to file a response to the petition and Marietta to file a reply. In its response, the state argued that the prospective jurors had all filled out a written questionnaire and had been questioned by the court and counsel before they were selected; that Marietta had not shown juror bias or actual misconduct; and, further, that the information developed by the investigator after trial would have been inadmissible under Rule 24.1(d), Ariz. R. Crim. P., which provides: "No testimony or affidavit shall be received which inquires into the subjective motives or mental processes which led a juror to assent or dissent from the verdict."

¶6 The trial court found Marietta had failed to state a colorable claim and denied relief without an evidentiary hearing. It also denied Marietta’s motions for rehearing and to stay the proceedings so that he could attempt to procure an affidavit from one of the female jurors. This petition for review followed.<sup>2</sup>

¶7 The trial court’s ruling is sustainable on any of several grounds. In its minute entry, the court first ruled Marietta’s claim precluded because the information that forms the basis of his claim—the statements of the two female jurors, made in September and October 2005—had been known to defense counsel well before Marietta was sentenced on November 8, 2005, and could have been urged in the trial court before sentencing and raised on direct appeal. Because Marietta had sixty days from the entry of judgment and sentence in which he could have moved, pursuant to Rule 24.2, Ariz. R. Crim. P., to vacate the judgment of conviction based on the same information he is asserting here, his failure to have done so was indeed a waiver of this claim. The court therefore did not abuse its discretion in ruling this claim precluded pursuant to Rule 32.2.<sup>3</sup>

¶8 Alternatively, the trial court found Marietta had failed to present competent evidence of juror misconduct in any event. His post-conviction petition was accompanied

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<sup>2</sup>Marietta does not mention in his petition for review the trial court’s ruling on another claim he asserted below, which the court characterized as a “claim of actual innocence” or a claim “that the testimony presented at trial was insufficient to support a guilty verdict.” Because Marietta has abandoned the claim on review, we do not address it.

<sup>3</sup>The trial court’s minute entry states the claim is precluded pursuant to Rule 32.2(a)(1). Although we find it precluded pursuant to a different provision of Rule 32.2, the finding of preclusion is nonetheless correct.

by no witness affidavits and did not identify the male juror or jurors who, he claimed, had withheld information from the court and counsel during the jury selection process. Instead, Marietta based his allegations solely on the investigator's written report containing the hearsay statements of the two female jurors. One of the two allegedly said "one of the male jurors said he had been molested," while the other told the investigator that "some of the males on the jury said they had been molested as children and . . . remembered things the way the [victim] remembered."

¶9 As the trial court correctly concluded, these statements were "manifestly hearsay and hence not competent [evidence]" of juror misconduct. *State v. Cookus*, 115 Ariz. 99, 106, 563 P.2d 898, 905 (1977) ("[S]tatements made by jurors not under oath, after the trial is over, are not competent evidence."), quoting *State v. Pearson*, 98 Ariz. 133, 136, 402 P.2d 557, 560 (1965). Establishing misconduct through the statements of jurors requires that the statements be under oath, "either by affidavit or by their direct testimony and not by the hearsay statements of others as to what a juror may have said." *Pearson*, 98 Ariz. at 136, 402 P.2d at 560.

¶10 In July 2008, two months after filing his petition below, Marietta filed in the trial court copies of the pretrial juror questionnaire form completed by two male jurors, who—Marietta theorizes—were the jurors in question and had "vouch[ed] for the cred[i]bility of the alleged victim [Marietta's stepdaughter] during jury deliberations," by stating that they, too, had been molested as children "and remembered things the way the [victim] remembered." As far as the record discloses, Marietta's theories rest entirely on

speculation and hearsay, not on competent, admissible evidence definitively identifying the juror or jurors in question or detailing any specific misconduct. *See State v. Adamson*, 136 Ariz. 250, 265, 665 P.2d 972, 987 (1983) (allegation of juror misconduct in failing to disclose certain information during voir dire did not state colorable post-conviction claim when “[n]o specific facts . . . given in support of . . . allegation”).

¶11 In general, “juror misconduct warrants a new trial if the defense shows actual prejudice or if prejudice may be fairly presumed from the facts.” *State v. Eastlack*, 180 Ariz. 243, 256, 883 P.2d 999, 1012 (1994), quoting *State v. Miller*, 178 Ariz. 555, 558, 875 P.2d 788, 791 (1994). “On questions of juror misconduct, we will reverse only when it is clear the trial court abused its discretion by denying a new trial.” *State v. Prince*, 160 Ariz. 268, 275, 772 P.2d 1121, 1128 (1989). And, as when a defendant claims a particular juror should have been stricken for cause, the defendant must show the juror in question “was biased and could not reasonably render a fair or impartial verdict.” *State v. Dickens*, 187 Ariz. 1, 11, 926 P.2d 468, 478 (1996). Even assuming Marietta had demonstrated that actual misconduct occurred, he has shown nothing approaching actual or presumptive prejudice. As the trial court noted, jury selection involved both a written questionnaire and oral inquiry into the prospective jurors’ experiences, directly or indirectly, with “child molestation, sexual conduct or other illegal or inappropriate sexual conduct between a child and an adult,” as well as explicit questions about whether any such experiences might affect the jurors’ ability to be fair and unbiased. All of the prospective jurors indicated they believed they could judge the evidence impartially, and Marietta has not shown that the male juror or jurors to

whom the female jurors' hearsay statements may have referred were in fact biased against him or predisposed to favor the prosecution over the defense.

¶12 In short, Marietta has neither alleged nor demonstrated that, even if all his assertions were true, a jury composed of different jurors would not still have found the victim's testimony credible and compelling and thus have reached the same result. In the absence of any colorable allegation of prejudice, the trial court did not abuse its discretion in denying relief summarily.<sup>4</sup> *See id.* Although we grant the petition for review, we find no abuse of the trial court's discretion and therefore deny relief.

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PHILIP G. ESPINOSA, Judge

CONCURRING:

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JOHN PELANDER, Chief Judge

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JOSEPH W. HOWARD, Presiding Judge

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<sup>4</sup>Although Marietta cited Rule 32.1(e) in the opening paragraph of his petition for post-conviction relief, he did not thereafter develop a substantive claim of newly discovered evidence, and the trial court did not treat his petition as presenting such a claim. As articulated by our supreme court in *State v. Nordstrom*, 200 Ariz. 229, ¶ 89, 25 P.3d 717, 743 (2001), newly discovered evidence must satisfy five requirements in order to warrant post-conviction relief: “[T]he evidence must be newly discovered, the motion must show due diligence, the evidence must not be merely cumulative or impeaching, the evidence must be material, and the evidence must be likely to change the verdict if it were introduced at trial.” *See also* Ariz. R. Crim. P. 32.1(e). Even if Marietta's claims had satisfied the other requirements for newly discovered evidence, his inability to show prejudice was fatal to his claim in any event.